SEMANTAN ESTATE (1952) SDN. BHD. v. COLLECTOR OF LAND REVENUE WILAYAH PERSEKUTUAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Syed Agil Barakbah S.C. JJ.) July 29, 1986 & April 4, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 195 of 1985]

Administrative Law – Mandamus – Compulsory acquisition of land – Whether application barred by Public Authorities Protection Act – Undue delay – Public Authorities Protection Act, 1948, s. 2(a).

The appellant was in possession of 700 acres of land in Selangor. The Selangor Government decided to acquire considerable acreage of land in the vicinity. The appellant raised various objections. In the meantime the Government withdrew from acquiring some of the land but took steps to acquire other parts of the land. To resolve the difficulties a reference was made to the High Court but the High Court declined to act – see [1960] M.L.J. 300. The acquired land was subdivided into 38 lots and each given a separate title. In 1983 the appellant applied for leave to apply for an order of mandamus directed at the respondent to complete the requisition procedure. Leave was granted and the appellant applied by notice of Originating Motion for an order of mandamus. The respondent thereupon applied for the originating motion to be struck out. Harun J. gave judgment in favour of the respondent on the ground that the institution of the suit was barred by virtue of section 2(a) of the Public Authorities Act 1948 and that there was undue delay. The appellant appealed.

Held: (1) the appellant had a right to appeal against the decision of the High Court in refusing to hear the reference and therefore had failed to avail itself of the alternative remedy. It has accordingly no specific legal right to apply for mandamus in this case;

(2) there was undue delay in this case and this would disentitle the appellant to the remedy;

(3) there is no good reason in giving the word "suit" in the Public Authorities Protection Act a restricted meaning so as to make the limitation prescribed by it not applicable to the prerogative writ of mandamus;

(4) in the circumstances mandamus could not be issued and the appeal must be dismissed with costs.

Cases referred to:

(1) *Semantan Estate (1952) Ltd.* v. *Collector of Land Revenue* [1960] M.L.J. 300.
(2) *Government of Malaysia* v. *Lee Hock Ning* [1973] 2 M.L.J. 51.
(3) *Rex* v. *The Port of London Authority, ex parte Kynoch Ltd* [1919] 1 K.B. 176.
(4) *Rex* v. *Hertford Union* (1914) 111 L.T. 716.
(5) *Merrick* v. *Liverpool Corporation* [1910] 2 Ch. 449.
(6) *Lim Yew Hock* v. *Municipal Commissioners of the Town and Fort of Malacca* [1936] M.L.J. 55 (Reprint 44).
(7) *Harrop* v. *Mayor of Ossett* [1898] 1 Ch. 525.
(8) *Bradlaugh* v. *Clarke* (1883) 8 App. Cas. 354, 364.
(9) *Tennekoon* v. *Duraisamy* [1958] A.C. 354; [1958] 2 All E.R. 479.
(10) *Maliban Biscuit Manufactories Ltd.* v. *R. Subramaniam & Ors.* [1971] A.C. 988.
(11) *A.G.* v. *Shrewsbury Bridge Co.* (1880) 42 L.T. 79.
(12) *Johnson* v. *Refuge Assurance Co. Ltd.* [1913] 1 K.B. 259.
(13) *Roberts* v. *Battersea Metropolitan Borough* (1914) 110 L.T. 566.
(14) *R.* v. *Westminster Assessment Committee* [1917] 2 K.B. 215.
(15) *Smith* v. *Chorley District Council* [1897] 1 Q.B. 532.
(16) *Davies* v. *Gaslight & Coke Co.* [1909] 1 Ch. 708.
(17) *Rex* v. *Dunsheath* [1951] 1 K.B. 127.
(18) *Re Application by Hamid bin Hassan* [1979] 2 M.L.J. 183.
(19) *Manggai* v. *Government of Sarawak* [1970] 2 M.L.J. 41.
(20) *Ee Kim Kin* v. *Collector of Land Revenue* [1967] 2 M.L.J. 89.
(21) *Chandrasegaram* v. *Prime Minister of the Federation* [1958] M.L.J. 278.

SUPREME COURT.

Isabella De Silva (Ms.) for the appellant.

T. Selventhiranathan (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) delivering the Judgment of the Court: This appeal is against the decision of Harun J. in striking out an application for an order of mandamus.

Semantan Estate (1952) Sdn. Bhd., the appellant, is a company incorporated in Malaysia in 1952 under the Companies Ordinance, 1940 and has been carrying on the business of planters, cultivators, growers, exporters of and in rubber and other crops. It was in possession of over 700 acres of land held under C.T. 12530 Lot 4647. The Selangor Government decided to acquire considerable acreage of land in the vicinity. So, pursuant to section 4(i) of the Land Acquisition Enactment (Cap. 140) (hereinafter called "the Enactment") the Selangor Government published Notification 401 in the *Selangor Government Gazette* on July 26, 1956. This was followed by the declaration under section 6(i) of "the Enactment" and published as Notification 577 in the said Gazette on October 25, 1956. Hearing was fixed on November 20, 1956. At the hearing the appellant was given a plan showing the boundaries of the areas to be acquired amounting to 250 acres. The appellant raised various objections and at the appellant's request hearing was post-

poned to November 27, 1956. The appellant asked for $13,000.00 per acre. Award was made for $5,282.00 per acre for 250 acres. Possession was duly taken on December 3, 1956. Subsequently the Selangor Government gave notice of withdrawal under section 49 of "the Enactment" from the acquisition on January 22, 1958 in respect of an area known as plot "B" consisting of 22 acres 1 rood 24 poles. Two plots of land known as plots "C" and "D" were found to be outside the acquisition. By another notification 117 published in the said *Gazette* on March 6, 1958, the Government proposed to acquire the said two plots "C" and "D" consisting of 60 acres 2 roods 27.5 poles. The result was that the area finally acquired was 263,272 acres. Hearing was fixed on June 18, 1958, but postponed a number of times and was finally abandoned on March 24, 1959. To resolve the difficulty the parties agreed to waive all irregularities. A reference was made to the High Court in *Semantan Estate (1952) Ltd* v. *Collector of Land Revenue.*[1] The position was made clear by Ong J., as he then was, at page 302:

> ". . . Thereafter it was sought to solve the problem by agreement to the effect that the whole area finally acquired by Government was to be deemed to have been acquired by virtue of the Notification No. 401 of July 26, 1956, and that the award by the Collector in respect of such area was at the rate of $5,282 per acre, as against a claim of $13,000 per acre by the applicants.
>
> The additional acquisition under Notification 117 of March 6, 1958 cannot possibly be included in the award of November 27, 1956, or in the reference, as has been done. No award has ever been made in respect of this additional area. The only way it could have been included in that award was under the provisions of section 51, which was in the circumstances impossible.
>
> I therefore hold that I have no jurisdiction under the Enactment to entertain the reference because it is not, in fact, a reference based upon the award of November 27, 1956, or any award. The Court has jurisdiction only under section 22. The parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court dehors the Enactment. Only Parliament can do so. Since this reference is expressly made under section 22 of the Enactment, there is only one proper course open to me, and I must decline to act."

Thereafter, following an exchange of correspondence between the parties, the matter came to rest. In 1963 the acquired land was subdivided into 38 lots and each given a separate title – all in the name of the Federal Land Commissioner.

Then by an *ex-parte* Originating Motion dated August 9, 1983 the appellant made an application for leave to apply for an order of mandamus directed at the respondent to complete the acquisition procedure. On December 8, 1983, Wan Hamzah J., as he then was, granted leave. Pursuant to the order the appellant by notice of Originating Motion dated December 20, 1983, applied for an order of mandamus. By summons-in-chambers dated October 12, 1984 the respondent applied for the Originating Motion to be struck out on two grounds. Harun, J. decided in the respondent's favour on the ground that the institution of the Originating Motion is barred by virtue of section 2(a) of the Public Authorities Protection Act, 1948 (Act 198) (hereinafter referred to as "the Act"). The other ground related to undue delay. The appellant appealed.

Section 2(a) of "the Act" reads:

> "2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect –
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;"

The main issue is whether the application for an order of mandamus is a suit, action or proceeding within the meaning of "the Act." There is no definition in "the Act" as to the meaning of suit, action or proceeding. *Government of Malaysia* v. *Lee Hock Ning*[2] was cited to show that English authorities before 1954 would be relevant as our law was the same as English law up to 1954. In that case, in dealing with section 2(a) of the Public Authorities Protection Ordinance, 1948, Lord Kilbrandon stated:

> ". . . That section substantially reproduces section 1 of the United Kingdom Public Authorities Protection Act 1893, as amended by the Limitation Act 1939 section 21(1), and the appeal has accordingly been presented on the basis of the law of the United Kingdom as it was until the passing of the Law Reform (Limitation of Actions, etc) Act 1954."

Numerous cases were cited in support of their contentions by the parties. We do not propose to go into all those cases. The submission of the appellant is that the principle emerging from the cases cited by her illustrates that mandamus does not come within the meaning of "action." The

difficulty in supporting this contention is that in none of the cases could we find the reason why the application of the prerogative writ was not within the meaning of "action, prosecution or proceeding" of the Public Authorities Protection Act, 1893. There are also cases which went the other way.

In *Rex* v. *The Port of London Authority, ex-parte Kynoch Ltd.*[3] the court, without deciding, inclined to the view that the six months' limitation to actions, prosecutions, and proceedings prescribed by section 1 of the Public Authorities Protection Act, 1893, does not apply to the prerogative writ of mandamus. As Sir John Simon, K.C. who argued the appeal pointed out that the same view was expressed by Avory J. in *Rex* v. *Hertford Union*[4] as an *obiter* that the Act had no application to the prerogative writ of mandamus. However, he went on to stress that there seemed to be no authority for that view. This was clearly illustrated in *Short and Mellor's* Crown Practice, 2nd Edition, page 219 that the words of the Act were wide enough to include the writ. In the earlier case of *Merrick* v. *Liverpool Corporation*[5] where the plaintiff commenced an action for mandamus, Eve J., taking into account the plaintiff's conduct, held that the Public Authorities Protection Act, 1893 was a complete answer to the claim. This is what he said at page 460:

"This conclusion disposes of the plaintiff's claim to the mandamus, but I desire to add that had I accepted the plaintiff's construction I should have felt great hesitation, after all that has happened, and the attitude which the plaintiff has adopted, in making any order, and, further, that in my opinion the Public Authorities Protection Act of 1893 would have afforded a complete answer to the claim. The cause of action accrued on October 12, 1904, or within a reasonable time thereafter, and I do not think the facts that the statutory neglect has continued to the present time and that it has been to the plaintiff's advantage to refrain from enforcing the statutory obligation could legitimately be regarded as operating to prevent the application of the statute. In such circumstances the plaintiff must be treated as having elected to accept the status quo in preference to enforcing her statutory right, and must put up with the consequences flowing from such election."

All these cases were referred to in *Lim Yew Hock* v. *The Municipal Commissioners of the Town and Fort of Malacca,*[6] which is an instructive case but in no way totally supports the contention of the appellant. In that case the court dismissed the application of the plaintiff for a mandamus to compel the defendants to exercise their discretion properly in the issue of a licence to the plaintiff's rubber factory. That decision was made when the word "suit" was not included in "the Act."

In construing the word "action" both parties cited *Harrop* v. *Mayor of Ossett;*[7] *Bradlaugh* v. *Clarke,*[8] *Tennekoon Comr for Registration of Indian and Pakistani Residents* v. *Duraisamy*[9] and *Maliban Biscuit Manufactories Ltd* v. *R. Subramaniam & Ors.*[10] *Halsbury's* Laws of England, 4th Edition, Volume 37 para. 17 page 24 on action states:–

" 'Action means any civil proceedings commenced by writ or in any other manner prescribed by rule of court. It has a wide significance as including any method prescribed by those rules of invoking the court's jurisdiction for the adjudication or determination of a lis or legal right or claim of any justiciable issue, question or contest arising between two or more persons or affecting the status of one of them. In its natural meaning 'action' refers to any proceeding in the nature of a litigation between a plaintiff and a defendant. It includes any civil proceedings in which there is a plaintiff who sues, and a defendant who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings which are embraced in the word 'matter'."

In the note below it is stated that among proceedings which have been held to be actions are relator actions *A.G.* v. *Shrewsbury Bridge Co.,*[11] county court actions *Johnson* v. *Refuge Assurance Co. Ltd.,*[12] mandamus proceedings *Roberts* v. *Battersea Metropolitan Borough;*[13] *R.* v. *Westminster Assessment Committee, etc.,*[14] and a civil suit or action in appeal to the Privy Council, *Tennekoon, Comr for Registration of Indian and Pakistani Residents* v. *Duraisamy.*

On the other hand, the respondent submitted that the English cases would not really assist us as our law developed differently. Prior to 1948 the Act was *in pari materia* to the English Public Authorities Protection Act, 1893. But in 1948 the word "suit" was introduced into the Act. There would not be any reason to include "suit" if "suit" and "action" are the same. It is contended that the word "suit" has a much wider meaning and cannot be subject to restriction. Under our law mandamus is issued by the court as an order in a suit. It is the submission of the respondent that the protection given by section 2(a) of the Act therefore applies to mandamus on "suit, action, or proceeding" because the word "suit" was not used in the English Act. In reply the appellant stressed that the Act must be construed from the intention expressed by the legislature in the Act itself and not by comparing definitions of the word "suit" and "action" in other statutes where the definitions are made for the purpose of those statutes.

Section 41 of the Civil Procedure Code, 1917

(Cap.7) provides that "Every suit shall be instituted by presenting a plaint to the court or such officer as it appoints on its behalf." Section 42 prescribes the content of a plaint. The appellant submitted that the inclusion of the word "suit" in the Public Authorities Protection Ordinance, 1948 was because prior to the revision of law in 1948 the Civil Procedure Code 1917 (Cap. 7) used "suit" while section 19 of the Courts Ordinance Malayan Union No. 3 of 1946 used "action" as description of proceedings in court. She thought the draftsman might have wanted to ensure protection of the Ordinance in all adversary proceedings by inclusion of the word "suit."

When a person feels aggrieved at the hands of the authority concerned in respect of his rights he wants a remedy and redress of his grievance. In this case there are difficulties. The conduct of the appellant must be taken into consideration. The matter happened so long ago and also the fact that the appellant had agreed to waive certain irregularities no doubt to facilitate the making of a decision. The respondent had made an award which was much lower than what the appellant asked for. The High Court had declined jurisdiction as the reference was not expressly made within the provision of section 22 of the Enactment. The appellant had a right of appeal against that decision but had apparently been advised not to appeal. In effect the appellant had a remedy but had never availed himself of it. Instead, he applied for an order of mandamus long after his right to the remedy lapsed. There must be an end to litigation and the process of the court should not be allowed to be abused. Under such circumstances, he must be regarded as having elected to accept the *status quo* since he did not enforce his right by appealing against the decision of the High Court in declining jurisdiction. He must take the consequence of his election.

Mandamus will not be issued where there is an alternative remedy available: *Smith* v. *Chorley District Council*,[15] *Davies* v. *Gaslight & Coke Co.*,[16] *Rex* v. *Dunsheath*[17] Thus in *Re Application by Hamid bin Hassan, Hamid bin Hassan* v. *Returning Officer, Karak & Ors.*[18] where the right or liability is created by statute which gives a special remedy for enforcing it, mandamus was refused. In the same way in *Manggai* v. *Government of Sarawak*[19] where the appellant sought a declaration against the decision of the Resident's Court instead of appealing to the Native Court of Appeal the Federal Court held that no declaratory judgment could be made where there was an alternative remedy. He could not use the procedure relating to declaration but should use the procedure laid down relating to appeal to the Native Court of Appeal.

Mallal at page 643 has this to say:

> "The issue of a prerogative order is at the discretion of the High Court and it will not be made 'if the conduct of the applicant had been such as to disentitle him to the relief asked for': see, *inter alia, Badat bin Drani* v. *Tan Kheat* ([1953] M.L.J. 67) or where the applicant has failed to avail himself of other statutory remedies:*Melayu Raya Press Ltd.* v. *Colonial Secretary* ([1951] M.L.J. 89) or he has failed to contest the validity of the proceedings in the statutory forum: *Choo Yin Loo* v. *Registrar of Societies* ([1957] M.L.J. 228); *Re Application by Loke Wan Tho* ([1956] M.L.J. 149). See also *Stanley* v. *Bull* ([1952] M.L.J. 65)."

Then there is the important question of the appellant's standing. He must have a specific legal right to ask the court to exercise its discretion to issue the order of mandamus. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to mandamus. As has been pointed out he has a right of appeal against the decision of the High Court in refusing to hear the reference. He has failed to avail himself of the alternative remedy. This point was not seriously contended by the parties before the learned Judge. We think it is too late for him to say he has no alternative remedy. Accordingly, we are of the view that he has no specific legal right to apply for mandamus in this case.

It is unfortunate that we do not have the benefit of the grounds of judgment to enable us to know exactly what was in the mind of the learned Judge when he dismissed the application of the appellant. In our view, in the interest of the high standard of public administration, a Judge should assist the appellate court by giving reasons as are adequate to enable the appellate court to ascertain whether the learned Judge is in error in reaching his decision. He may have taken into account irrelevant consideration or omitted to take into account relevant consideration. What are "adequate" reasons would depend on the circumstances of each case. Had he decided to refuse to issue the order of mandamus on the ground of undue delay we would have no difficulty in dealing with the matter. Delay in this case is so clear that it would disentitle the appellant to the remedy. Where the delay is long mandamus will not be issued. Thus in *Ee Kim Kin* v. *The Collector of Land Revenue*[20] the Court refused to issue mandamus because of the delay of over four years in making the application. So, also *Chandrasegaram* v. *The Prime Minister of the Federation of Malaya*[21]

where Sutherland J. took the view that the application for mandamus should be refused owing to the long delay.

We can see no good reason in giving the word "suit" in "the Act" the restricted meaning which has been advanced. The fact that the word may be construed differently under a different legal system does not necessarily mean that we are not justified in giving the same word a different meaning in the light of local circumstances and development peculiar to our own legal system. As Bankes L.J. said in *Rex* v. *Port of London Authority, ex-parte Kynoch Ltd.* at page 183:

"Every case must depend on its own particular circumstances; but decided cases furnish some rules which ought to govern the Court in the exercise of its discretion to grant or refuse the prerogative writ of mandamus. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal . . . . "

There were clearly irregularities in the acquisition. The position was stated lucidly by the late Ong J., as he then was. Suffice for us to say that in the circumstances mandamus could not be issued. However, we consider the learned Judge was right to refuse leave not only because it is within "the Act" but also because the appellant has not exhausted his right of appeal against the decision of the High Court in declining to act.

The issue of an order of mandamus is strictly a matter of discretion. In order to ascertain whether it is proper or not to grant the remedy the court is entitled to take into consideration not only the conduct of the applicant but also all the surrounding circumstances of the case. The procedure of the court cannot be abused as there must be an end to any litigation.

Accordingly, we would dismiss the appeal with costs both here and the court below. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Chooi & Company.*

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS v. HOTEL MALAYA SDN. BHD.

[A.C.J. (Wan Hamzah S.C.J.) October 11, 1985]

[Kuala Lumpur – Civil Appeal No. 35 of 1983]

Trade Union – Strike – Whether strike legal – Collective agreement – Whether there should be one single agreement or two separate agreements – Whether employment validly terminated – Whether there is a trade dispute.

Industrial Relations – Collective agreement – Whether there should be single or separate agreements – Whether employment validly terminated – Whether there is a trade dispute – Industrial Relations Act, 1967, ss. 2, 26(2), 33A & 45.

Companies – Hotel company – Restaurant company not wholly owned by hotel – Trade union has no right to insist on single collective agreement negotiation.

The National Union of Hotel, Bar & Restaurant Workers (the Union) made a proposal to Hotel Malaya Sendirian Berhad (the Hotel Company) for a new collective agreement and suggested that there should be a single collective agreement between the Union on the one hand and the Hotel Company and the Kuala Lumpur Restaurant Sendirian Berhad (the Restaurant Company) on the other. Therefore, the Union invited the Hotel Company to enter into negotiation for a single collective agreement on that basis. The Hotel Company denied that it was the employer of the workers in the restaurant of the Restaurant Company, and it did not agree to a single collective agreement and refused to negotiate unless the Union agreed to separate negotiations on the basis of separate collective agreements, one in respect of the Hotel Company and another in respect of the Restaurant Company. The Union felt that the parties had reached a deadlock and therefore decided to commence strike action against the Hotel Company. The workers of the Hotel Company went on strike on August 1, 1979.

Upon the commencement of the strike the Hotel Company referred the matter to the Minister of Labour and Manpower forthwith. On August 9, 1979, the Hotel Company wrote to its workers on strike terminating their services as from that date on the ground of illegal strike.

On August 18, 1979, the Minister through Ketua Setiausaha of his Ministry referred the dispute to the Industrial Court under section 26(2) of the Industrial Relations Act (the Act). After hearing the parties the Industrial Court made an award in favour of the Hotel Company. Subsequently, on the application of the Union the Industrial Court referred certain questions of law to the High Court under section 33A of the Act.

Held: (1) the strike was illegal;

(2) the Industrial Court should have considered and decided on the question whether the Hotel Company was the employer of the workers in the restaurant of the Restaurant Company because the question was relevant. In the present case the Hotel Company was not the employer;